Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-473

REBECCA REYHER,

Petitioner,

—v.—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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No. ....

REBECCA REYHER,

Petitioner,

—v.—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rebecca Reyher respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit on April 5, 1976.

Opinions Below

The opinion of the Court of Appeals is reported at 533 F.2d 87 and appears in the Appendix hereto (1a-11a). The opinion of the District Court for the Southern District of New York is reported at 387 F. Supp. 869 and appears in the Appendix hereto (13a-20a). A memorandum opinion of the District Court denying defendants' motion for summary judgment is unreported and appears in the Appendix hereto (20a-26a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 5, 1976. A timely petition for rehearing and rehearing en banc was denied on July 7, 1976 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals exceeded its jurisdiction under Rule 52(a) of the Federal Rules of Civil Procedure in reversing the findings of fact by a trial court in the absence of a ruling that such findings were "clearly erroneous"?

(a) In this connection the Court of Appeals disregarded and ignored the record submitted in the trial court and reached a contrary decision unsupported by the facts and exhibits in evidence.

2. Whether the Court of Appeals pursuant to Federal Copyright Law (17 U.S.C. § 101) is compelled after a plenary trial for infringement of copyright that yielded a finding of fact by the court of similarity to and access by defendants to the plaintiffs' work, to render a judgment for a plaintiff who has complied with the Act in registering an original work.

Statutory and Constitutional Provisions Involved

The statutory and constitutional provisions involved are:

Federal Rules of Civil Procedure, Rule 52(a) 17 U.S.C. § 101 and Article I, Sec. 8, cl. 8 of the Constitution

of the United States. Relevant portions of these provisions are reproduced in Appendix B.

Statement of the Case

Plaintiffs were owners of a copyright in a book entitled "The Most Beautiful Woman in the World" first registered in 1945 (No. A187751) (Exhibit 1).[1] The story was written by plaintiff and petitioner Rebecca Reyher and illustrated by plaintiff Ruth Gannett. Judge Cannella found that the book

> "tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that 'my mother is the most beautiful woman in the world'. Upon hearing this the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear. She is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and tells the villagers, 'this is my mother, the most beautiful woman in the world.' The moral, as the village leader points out, is that 'we do not love people because they are beautiful, but they seem beautiful to us because we love them.'" (A. - A.).

Plaintiff Reyer testified that she heard the story as a child from her mother (T. 69) who "frequently did change or make up stories" (T. 148). The story was com-

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[1] References to Exhibits are Trial Exhibits admitted in evidence below. References to T. are to pages in the transcript of the trial before Judge Cannella.

municated from mother to child orally in the Russian language (T. 71). Mrs. Reyher testified that she did not hear the story from anyone other than her mother (T. 148), nor did she know of her own knowledge whether or not there was a Russian folktale similar to the story her mother told her (T. 147). No other evidence was presented indicating that there was a story in the Russian —or any other—language prior to Mrs. Reyher's writing of the copyrighted book.

Defendants conceded that plaintiffs' work was the only version of the story in the English language (T. 273), and they offered no evidence of any other version in any language.

Plaintiff Reyher testified at length concerning the writing, in English prose, of a book suggested by a story which she had heard many years earlier as a child, a task which was both creative and taxing. (T. 71-73).

In November of 1970, Children's Television Workshop produced a puppet play set in Russia and entitled "The Most Beautiful Woman in the World" (audio transcript of video tape: "Exhibit 13") which Judge Cannella found to be substantially similar to plaintiffs' copyrighted book. Shortly thereafter defendant Children's Television Workshop produced an illustrated magazine article ("Exhibit 9") which Judge Cannella also found to be substantially similar to plaintiff's copyrighted book. Defendant Tuesday Publications, Incorporated published an issue of "Tuesday at Home" magazine which contained an illustrated article ("Exhibit 11") in which the locale had been changed from Russia to Africa where again, Judge Cannella found similarity. The drawings for the original Sesame Street text (Exhibit 14A-14F) showed a Russian setting later changed in the published story, to Africa.

The script for the television program was written by Jon Stone, a defense witness in the trial. The other allegedly infringing publications by defendants were written after Stone's script was dramatized and televised. Defense counsel conceded that "If Stone did infringe, it follows that the others did infringe." (T. 5).

Stone wrote his script sometime in the autumn of 1970. He testified that he first heard the story which he dramatized "around 1950" (T. 158) or about five years after plaintiffs' book was published. The story he heard was in English. Stone testified that he heard the story from either his mother or his sister's baby-sitter (T. 158), neither of whom understood the Russian or German language; nor did he know the source of the story told by the storyteller. (T. 212).

Judge Cannella, in his written opinion enbodying his findings of fact, found Stone's script to be substantially similar to plaintiffs' book, to present "an identical sequence og events" as plaintiffs' book (14a), and to contain at least one sentence ("Once upon a time, long, long ago") which is a verbatim replica of plaintiffs' words. He also found access: "The most that could be said is that they [the defendants] have read the plaintiffs' work and have retold the story in their own words." (16a). This finding followed from the fact that at least 120,000 copies of plaintiffs' book had been distributed (T. 120), and it had attracted widespread fame when it was awarded literary prizes. (T. 100, 104).

The District Court dismissed the complaint after a trial on all the issues on the grounds that plaintiffs' copyrighted work was not entirely plaintiff's "original intellectual product' as opposed 'to the old public domain elements of which [the author] has made use' "—the court held that it was a derivative work. The District Court said that the plot and sequence of events belonged to the

Russian folktale and were not protected by the copyright laws. Said the District Court:

> "In a sense, the defendants have done nothing more than make their own variation of the story Mrs. Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws." (16a, 17a)

The Court of Appeals held as a matter of law that Mrs. Reyher's work was not derivative on the basis of the record below and it reversed the District Court on its finding on the law that the plaintiff's book was a "derivative work". This had been the only issue briefed in the Court of Appeals by plaintiffs-appellants and the appellate court agreed with plaintiffs' position on this issue. Said the court below:

> "Reyher admittedly borrowed the 'idea' embodied in the story from her mother. The basic plot of this children's book is very simple. . . . Reyher's presentation of the story line was entirely her own. Aside from its theme, she could neither recall the exact story her mother told nor the precise language used. More importantly, no tangible or intangible prior work was proved with sufficient detail to enable a court to judge either whether substantial copying of anything other than the idea of the prior work had occurred or which part of her adaptation constituted her own new, and thus protected, material. In light of the absence of such evidence, to characterize Reyher's work as derivative merely because she used memories of her mother's story would create problems in protecting any literary endeavor as well as exacerbate the difficulty in determining the protection to be afforded a particular effort." (5a)

The court below then affirmed the District Court's dismissal of the complaint on completely different grounds, which had not been briefed or argued below. It reversed the express fact finding of the District Court without holding or suggesting that such fact-finding was "clearly erroneous" as required by F.R.C.P. 52(a). Said the court:

> "Although we disagree with the district court's 'derivative work' rationale, we nevertheless affirm its dismissal of this case on the ground that any similarities between the two works related only to non-copyrightable matter. In reaching this conclusion, we must overturn the trial court's factual finding that there were substantial similarities between the two works. While we recognize that our appellate function usually does not include fact-finding, where, as here, the determination of similarity rests solely on a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder, 'we are in as good a position as the trial judge' to determine the issue." (5a, 6a)

In the court's discussion which follows, the appellate court revealed that it failed to do its homework and study the exhibits which were before it and, accordingly, it erroneously made the new findings of fact. It discussed plaintiffs' thirty-five page book as focusing on a "Russian family living in the Ukraine" and stated that "*the setting of the story is an important component of the work*" (9a) (emphasis supplied)

The Court of Appeals then disregarded the evidence that the original Sesame Street production in the claimed infringement was a puppet play set in the Ukraine in Russia, showing the traditional Russian onion domes, the Russian fields and babushka-encircled heads of the women, and stated

> "The *Sesame Street Magazine* version of the story, two pages long, presumably is set in Africa. There is no textual detail about African life, any information comes from the five illustrations, which show African dress on the characters, a woman carrying a basket on her head and thatched huts." (A.....)

It thus appears that the Court of Appeals reversed the fact finding of the District Court on the basis of reading one exhibit only (Exhibit 11). The court ignored the other evidence before the court below: a video transcript (Exhibit 12 and 13) which mentioned the locale or setting as Russian and showed a Russian field and town square. In ignoring such evidence, the court argued that the locale was "an important component of the work."

Reasons for Granting the Writ

I.

The court below disregarded the "clearly erroneous" requirement of F.R.C.P. 52(a) and reversed the finding of fact of the court below.

The court below in this case and a line of cases before the instant case has disregarded the rule clearly enunciated by this Court in *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123 (1969).

> "In applying the 'clearly erroneous' standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind

> that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' "

It was expressly this standard which the court below disregarded when it said

> " 'we are in as good a position as the trial judge' to determine the issue".

In a line of cases led by *Soptra Fabrics Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2d Cir. 1974)[3], there cited below, the Court of Appeals for the Second Circuit has read out of the law, or considered inapplicable to its deliberations, the necessity of a finding under Rule 52(a) of "clearly erroneous" to reverse a finding. It disregards that standard in reversing a finding of fact by a District Court whenever it believes it is reviewing documentary evidence and not the credibility of witnesses. This goes back in judicial history to a statement of Learned Hand in *Eddy* v. *Prudence Bonds Corporation*, 165 F.2d 157, 163 (2d Cir. 1947), *cert. den.*, 333 U.S. 845 (1948).

> ". . . appellate courts have untrammelled power to interpret written documents."

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[3] See *Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2 Cir. 1969); *Milworth Converting Corporation* v. *Slifkam*, 276 F.2d 443, 445-446 (2d Cir. 1960); *Orvis* v. *Higgins*, 180 F.2d 537, 539 (2 Cir. 1950), *cert. den.*, 340 U.S. 810 (1950).

Even before *Zenith, supra* the conflict in the circuits on this issue was recognized in other circuits. Said the Court of Appeals for the Sixth Circuit in *United States Steel Corporation* v. *Fuhrman*, 407 F.2d 1143, 1145 (6th Cir. 1969)

> "Our research reveals a split of authority among circuits on this point . . ."

In *Fuhrman*, the court held that it was bound by the "clearly erroneous" rule even though the District Judge heard no live evidence. To the same effect is *Local Union 1219 etc.* v. *United Brotherhood of Carpenters & Joiners*, 493 F.2d 93, 96 (1 Cir. 1974); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 454 F.2d 527, 530 (1 Cir. 1972); *Leach* v. *Crucible Center Co.*, 388 F.2d 176, 179 (1 Cir. 1968); *Smith* v. *United States*, 502 F.2d 512, 519 (5 Cir. 1974); *United States* v. *Florida*, 482 F.2d 205, 207, 208 (5 Cir. 1973); *Lambros* v. *Commissioner of Internal Revenue*, 459 F.2d 69, 72 (6 Cir. 1972); *Porter* v. *Commissioner of Internal Revenue*, 388 F.2d 670, 671 (6 Cir. 1968); *Traylor* v. *United States*, 418 F.2d 262, 264 (6 Cir. 1969); *Schnadig Corp.* v. *Gaines Mfg. Co., Inc.*, 494 F.2d 383 (6 Cir. 1974); *Aetna Casualty and Surety Co.* v. *Hunt*, 486 F.2d 81, 84 (10 Cir. 1973); *Case* v. *Morrisette*, 475 F.2d 1300 (C.A.D.C. 1973). Contra: *Teamsters Local U. No. 688* v. *Crown Cork & Seal Co., Inc.*, 488 F.2d 738, 740 (8 Cir. 1974); *Arrow Equipment Inc.* v. *M-R-S Manufacturing Co.*, 416 F.2d 152 (8 Cir. 1969); *Securities and Exchange Commission* v. *Coffey*, 493 F.2d 1304, 1311 (6 Cir. 1974) relying on *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 879 (2 Cir. 1972) [Former Associate Justice Tom Clark dissenting] Cf. *Aunt Mid* v. *Fjell-Oranje Lines*, 458 F.2d 712 (7 Cir. 1972), *cert. den.*, 409 U.S. 877 (1972). *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n. 9 (1963).

When Rule 52(a) was adopted in 1937, the Advisory Committee said:

> "It [Rule 52(a)] is applied to all findings in cases tried without a jury whether the finding is of a fact concerning which there was a conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony." Moore *Federal Practice* ¶52.04, p. 2680.

It thus appears that the court below in making its finding *de novo* that there was no similarity between the plaintiffs' copyrighted work and the defendants' works, violated the express language of Rule 52(a) since the District Court had found otherwise. The court below did not say that the findings were clearly erroneous but said, instead, it could review the facts as though there had been no prior determination. It further violated the holding in *Zenith* v. *Hazeltine, supra*, and is part of a long line of cases in the Second Circuit which disregard Rule 52(a), if the credibility of witnesses is not at issue. Although there is a split in circuits, other circuits have followed the Second Circuit. This issue is ripe for decision by this Court.

II.

The court below violated the basic rule of appellate review—to read the record—and erroneously reversed on a mistaken view of the facts.

The point above—that the findings of a District Judge should not be reversed unless clearly erroneous—is underlined by the fact in this case that the court below did not look at all the exhibits. Had it done so and looked at the video tape of defendants' puppet presentation (Exhibits 12, 13), it would have observed that both the plaintiffs' and defendants' stories were set in Russia. Later

defendant in the "Tuesday at Home" article changed the setting considered by the court as an "important component of the work" to Africa. On the mistaken belief that all of the defendants' stories were set in Africa, the Court of Appeals reversed the finding of fact of similarity of the defendants' works to plaintiffs'.

This error occurred at least in part because the court made its findings on points not briefed by counsel. The only issue briefed and argued by appellants and appellees was whether or not the trial court had erred as a matter of law on the factual record in deciding that plaintiffs' work was not covered by copyright protection because it was based on a Russian folktale and derivative, and in doing so in the absence of any evidence of another work in the public domain. The court at the very least should have returned the issue it thought important to counsel for briefing and reargument. Cl. *Connell Construction Co.* v. *Plumber & Steamfitter*, 421 U.S. 616 (1975). Such briefing and reargument by plaintiff would have demonstrated the many other "spotted dog" similarities between the plaintiffs' original work and the defendants' copies that sustain the charge of plagiarism. These similarities were recognized by the trial court.

III.

The court below denied plaintiffs their constitutional and statutory right to copyright protection.

Read together the decisions below of the District Court and the Court of Appeals have an Alice-in-Wonderland quality. On the practical side, they deny a creator and author the right recognized in the Constitution of the United States (Art. I, sec. 8, cl. 8) to copyright protection. Cf. *Holmes* v. *Hurst*, 174 U.S. 82, 85 (1899); *Goldstein* v. *California*, 412 U.S. 546, 555 (1973). It has been said:

> ". . . intellectual property is, after all, the only absolute possession in the world. . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property."
>
> Nathanial S. Shaler, Harvard Geologist in 1878, quoted by Solberg, *Copyright Reform* 14 Notre Dame Lawyer 343, 358 (1939).

Plaintiff, Mrs. Reyher, initially was told that her work was not entitled to copyright protection because it was derivative—because it was based on a Russian language folktale in the public domain. This holding of the District Court obtained even though there was no evidence adduced of any other such story as she told, or as a source for the claimed infringing work, and even though 17 U.S.C. § 209 gives presumptive validity to an author's certificate of copyright and, even if derivative, such copyright under 17 U.S.C. § 7 is valid even if the copyrighted work is a translation of another work. Nimmer: *The Law of Copyright* § 39 (1976).

No other source for defendants' infringing work was shown to the court below or to the appellate court. The court below effectively found similarity and access but ruled in favor of defendants on erroneous legal grounds. The Court of Appeals affirmed the District Court on a different ground completely, which required it to disregard evidence before the District Court. Thus was Mrs. Reyher's valid copyright action defeated by a two-cushion, two-court shot.

This Court has before it an issue basic to the right of any author to protect the result of his imagination and industry, up to now considered his property if he or she has complied appropriately with the copyright law. The process involved below has effectively denied the right of copyright to petitioner.

CONCLUSION

This Court should issue the writ and grant petitioner a hearing.

October 1, 1976

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 143—September Term, 1975.

(Argued October 31, 1975 Decided April 5, 1976.)

Docket No. 75-7278

REBECCA REYHER and RUTH GANNETT,

Plaintiffs-Appellants,

v.

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants-Appellees.

Before:

MULLIGAN, OAKES and MESKILL,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, John M. Cannella, *Judge*, dismissing plaintiffs' copyright infringement complaint after trial without a jury.

Affirmed.

ELEANOR JACKSON PIEL, Esq., New York, New York, *for Appellants.*

EUGENE L. GIRDEN, Esq., New York, New York (Carleton G. Eldridge, Jr., Esq., Paul B.

Jones, Esq., Coudert Brothers, New York, New York, of counsel), *for Appellees.*

Paul P. Selvin, Esq., Butler, Jablow & Geller, New York, New York, *for Amicus Curiae, Writers Guild of America.*

Meskill, *Circuit Judge:*

Plaintiffs below, Rebecca Reyher and Ruth Gannett, appeal from an order of the District Court for the Southern District of New York, John M. Cannella, *Judge,* dismissing their copyright infringement complaint after a two day trial without a jury. We affirm the district court's disposition of this case on the ground that there was no substantial similarity between the two works as to copyrightable matter.

Appellants Reyher and Gannett are the author and illustrator respectively of a children's book entitled "My Mother Is The Most Beautiful Woman In The World" which was published with notice of copyright on August 24, 1945. Appellee Children's Television Workshop ("CTW") is the producer of the educational children's television program known as "Sesame Street" and the publisher of *Sesame Street Magazine.* Appellee Tuesday Publications, Inc. ("TPI") is the publisher of a monthly periodical known as *Tuesday At Home,* which is distributed by several newspapers across the country.

The complaint alleges that CTW and TPI infringed and are continuing to infringe plaintiffs' copyright by publishing an illustrated story entitled "The Most Beautiful Woman In The World," which plaintiffs claim was copied from their book without their knowledge or consent. The plaintiffs further assert that CTW infringed their copyright by producing, performing, taping, and tele-

vising, without knowledge or authorization, a television skit entitled "The Most Beautiful Woman In The World."

The defendants deny any infringement of plaintiffs' copyright. They contend that a thematic idea is not protected by copyright and further, that as a "retold" folk tale, the story line involved here is in the public domain. A two day trial was held before Judge Cannella. The three key witnesses were appellant Reyher, Jon Stone, author of the allegedly infringing script and executive producer and head writer for "Sesame Street," and Tibor Gergely, the artist who illustrated the script for *Sesame Street Magazine.*

Reyher testified that her book "My Mother Is The Most Beautiful Woman In The World" had its genesis in a story told to her as a child in Russian by her Russian mother. While she could not repeat this story verbatim, she stated that she had "taken a storyline . . . [and] adapted it . . . . [It was her] treatment . . . even though it was [her] mother's story." Later in her testimony, Reyher said she had only "assumed" that the story was a Russian folktale known to others.

Stone testified that he remembered the theme used in his script from a story told to his younger sister more than 20 years ago. Denying that he had ever seen appellants' work in any form, Stone stated that he used no source for his script other than his memory. Tibor Gergely, the artist who had sketched the allegedly infringing illustration of the reunion scene between mother and child, testified that he had referred to no outside materials when illustrating the story, although he remembered the story from a book read during his childhood in Europe; further, he stated that since he had never seen appellant Gannett's illustrations, any similarity in the drawings of the reunion scene was coincidental.

Judge Cannella dismissed the infringement claim. He noted that there was substantial similarity between the two works because "[w]hile defendants' rendition of the story takes place in a different locale and is told with fewer frills . . . both stories present an identical sequence of events." He concluded, however, that since Reyher testified that the story line in her book was "substantially taken from, if not identical with, the story told to her by her mother" and since she failed to show that she had added anything to the story or changed it in any significant way, Reyher's book was a derivative work, i.e., one "substantially copied from a prior work in the public domain." Reyher'c copyright thus protected only *her* original product, which did not include the plot. The court found no textual copying.[1] In comparing the two illustrations, the district court concluded that the differences between them were so substantial as to preclude a finding of infringement. 387 F.Supp. 869 (S.D.N.Y. 1975).

Initially we feel that we must note our grave doubts about the district court's characterization of Reyher's book as a derivative work. In addition to the classes of works eligible for copyright protection under 17 U.S.C. § 5, Section 7 of Title 17 permits copyrighting "adaptations, . . . translations, or other versions of works in the public domain," so long as the contributions made by the author to the previously existing work are not merely trivial. The protection afforded by § 7, however, is limited solely to the author's additions to the prior underlying work. Generally, "[a] work is not derivative unless it has substantially copied from a prior work. If that which is borrowed consists merely of ideas and not of the expression of ideas, then although the work may have in

1 The district court found little, if any, paraphrasing and also noted that the only phrase which appeared in both works was "Once upon a time, long, long ago."

part been derived from prior works, it is not a derivative work." 1 M. Nimmer on Copyright § 39 at 166-167 (1975) (hereinafter "Nimmer"). This statement presents, we think, the proper perspective from which to evaluate Reyher's book.

Reyher admittedly borrowed the "idea" embodied in the story from her mother. The basic plot of this children's book is very simple. *See* discussion *infra*. Reyher's presentation of the story line was entirely her own. Aside from its theme, she could neither recall the exact story her mother told nor the precise language used. More importantly, no tangible or intangible prior work was proved with sufficient detail to enable a court to judge either whether substantial copying of anything other than the idea of the prior work had occurred or which part of her adaptation constituted her own new, and thus protected, material. In light of the absence of such evidence, to characterize Reyher's work as derivative merely because she used memories of her mother's story would create problems in protecting any literary endeavor as well as exacerbate the difficulty in determining the protection to be afforded a particular effort.

Although we disagree with the district court's "derivative work" rationale, we nevertheless affirm its dismissal of this case on the ground that any similarities between the two works related only to non-copyrightable matter. In reaching this conclusion, we must overturn the trial court's factual finding that there were substantial similarities between the two works. While we recognize that our appellate function usually does not include factfinding, where, as here, the determination of similarity rests solely on a a comparison of the works in issue rather than on credibility of witnesses or other evidence only for the factfinder, "we are in as good a position as the trial judge" to deter-

mine the issue. *Soptra Fabrics Corp.* v. *Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 1093 (2 Cir. 1974); *Concord Fabrics, Inc.* v. *Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2 Cir. 1969) (*per curiam*); *Millworth Converting Corporation* v. *Slifka*, 276 F.2d 443, 445-446 (2 Cir. 1960); *cf. Orvis* v. *Higgins*, 180 F.2d 537, 539 (2 Cir.), *cert. denied*, 340 U.S. 810 (1950). *See* 1 Nimmer § 140 at 607.

In an infringement action, a plaintiff must establish ownership of the copyright and copying by the defendant. *McGraw-Hill, Inc.* v. *Worth Publishers, Inc.*, 335 F.Supp. 415, 419 (S.D.N.Y. 1971); 1 Nimmer § 141 at 611. As was done in the instant case, ownership is commonly proved by production of the copyright registration certificate. Because of the inherent difficulty in obtaining direct evidence of copying, it is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works. *Arnstein* v. *Porter*, 154 F.2d 464 (2 Cir. 1946); *Bevan* v. *Columbia Broadcasting System, Inc.*, 329 F.Supp. 601 (S.D.N.Y. 1971). "[I]f there are no similarities, no amount of evidence of access will suffice to prove copying." *Arnstein* v. *Porter, supra*, 154 F.2d at 468.

It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself. *Mazer* v. *Stein*, 347 U.S. 201, 217 (1954); *Baker* v. *Selden*, 101 U.S. 99, 102-103 (1879). This principle attempts to reconcile two competing societal interests: rewarding an individual's ingenuity and effort while at the same time permitting the nation to benefit from further improvements or progress resulting from others' use of the same subject matter. "In the case of verbal 'works' it is well settled that although the 'proprietor's' monopoly extends beyond an exact reproduction of the words, there can be no copyright in the 'ideas' disclosed but only in their 'expression.' Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2 Cir. 1960) (L. Hand).

The difficult task in an infringement action is to distill the nonprotected idea from protected expression. In *Nichols* v. *Universal Pictures Corporation*, 45 F.2d 119, 121 (2 Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), Judge Learned Hand articulated his "abstractions test" by noting that "[u]pon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out . . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas' to which, apart from their expression, his property is never extended." Attempting to further delineate this boundary, one commentator has stated that "protection covers the 'pattern' of the work . . . the sequence of events and the development of the interplay of characters." [2]

While the demarcation between idea and expression may not be susceptible to overly helpful generalization, it has been emphasized repeatedly that the essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization. *Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 54 (2 Cir.), *cert. denied*, 298 U.S. 669 (1936); *Burnett* v. *Lambino*, 204 F.Supp. 327 (S.D.N.Y. 1962); *Bevan* v. *Columbia Broadcasting System, Inc., supra*, 329 F.Supp. at 605. Another helpful analytic concept is that of "scenes a faire," se-

2 Z. Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 503, 513 (1945).

quences of events which necessarily follow from a common theme. "[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of actionable similarity." 1 Nimmer § 143.11 at 626.2; *see* Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 462 (1951). Copyrights, then, do not protect thematic concepts or scenes which necessarily must follow from certain similar plot situations. Thus, "no one infringes, unless he descends so far into what is concrete [in a work] as to invade . . . [its] 'expression'." *National Comics Publications* v. *Fawcett Publications*, 191 F.2d 594, 600 (2 Cir. 1951). An example illuminating these somewhat theoretical statements may be helpful at this point. In *Nichols* v. *Universal Pictures Corporation, supra*, the author of the play "Abie's Irish Rose" claimed that her work had been infringed by defendant's film "The Cohens and The Kellys." The court found that the only matter common to the two stories, a "quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation," was not protected by copyright; similarly, the four characters common to both plays were prototypes too indistinct to merit copyright protection. The court concluded that "[a] comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters," was not within the protection afforded by copyright because this theme was part of plaintiff's ideas.

The question which remains is whether defendants in the instant case utilized the idea in Reyher's book or instead descended so far into the concrete as to invade her expression. We must first note that both stories, intended for children, are necessarily less complex than some other works submitted to pattern analysis. *See, e.g., Bevan* v.

Columbia Broadcasting System, Inc., supra; Nichols v. *Universal Pictures Corporation, supra.* Therefore, in addition to the essential sequence of events, we might properly consider the "total concept and feel" of the works in question. *Roth Greeting Cards* v. *United Card Company*, 429 F.2d 1106, 1110 (9 Cir. 1970).

Reyher's thirty-five page book focuses on a Russian family living in the Ukraine; the setting of the story is an important component of the work. The main protagonists are the mother, father and six year old daughter. The first few pages describe the duties of each family member in harvesting the wheat crop. There is also narrative about the customary feast days during harvesting as Reyher describes, through the literary device of the little girl helping her mother, the preparation of distinctive Russian foods. The feast day itself is depicted with vivid details of costume and entertainment. We have now progressed through fifteen pages of appellant's book. On the last day of field work prior to the feast, the little girl is separated from her parents. Meeting a group of villagers unfamiliar to her, she describes her mother as the most beautiful woman in the world. The village leader sends boys to bring back all the likely candidates; none, of course, is the mother. Finally, a homely woman, in fact the girl's mother, approaches the crowd and is joyfully reunited with her child. The village leader presents the moral of the story: "We do not love people because they are beautiful, but they seem beautiful to us because we love them." At the feast day, the little girl tells her mother that, although other children have teased her about her feelings, she thinks her mother is the most beautiful woman in the world. The mother expresses her happiness that her child sees with her heart as well as with her eyes.

The *Sesame Street Magazine* version of the story, two pages long, presumably is set in Africa. There is no textual

detail about African life; any information comes from the five illustrations, which show African dress on the characters, a woman carrying a basket on her head, and thatched huts. The story opens with a little boy crying in the fields because he has become separated from his mother. He describes her as the most beautiful woman in the world. The village leader gathers all the beautiful women from surrounding villages to no avail. An old unattractive woman, the missing mother, is reunited with her son. The village leader states that although he doesn't find her beautiful, the important thing is what the little boy thinks. The lesson to be learned is "[w]hat's not so beautiful to some can be very, very beautiful to others."

Based on the special relationship between parent and child, both works present the thematic concept that to a lost child, the familiar face of the mother is the most beautiful face, even though the mother is not, in fact, beautiful to most.[3] The overlapping sequences of events concern the lost child finding his or her mother, albeit with some difficulty because of the description given. This similarity of events, however, may be considered "scenes a faire," scenes which necessarily result from identical situations.[4] Thus, where a lost child is the protagonist, there is likely to be a reunion with parents. Furthermore, the morals stated by the two stories differ in emphasis. Reyher's book focuses on how love makes people appear

3 Appellants do not, and could not, claim that the title of their book is within copyright protection. *Arnstein* v. *Porter*, *supra*, 154 F.2d at 474.

4 As well stated by Judge Yankwich in his article, *Originality in the Law of Intellectual Property*, *supra*, 11 F.R.D. at 464-465, "[S]imilarity of theme so obviously calls for similarity of treatment that originality will be made to reside in the association and grouping of materials, the delineation of character, the conflict and the other elements which are the very essence of a dramatic production, . . . representing human beings in action or in conflict."

beautiful, while the CTW story stresses that what is beautiful to some may not be beautiful to others. More importantly, however, the two works differ in "total feel." Reyher's book presents a picture of family life in the Russian Ukraine and develops the characters of the little girl and her mother. The CTW story is barren of meaningful setting or character development in its attempt to present its theme. The two stories are not similar in mood, details or characterization. Since both present only the same idea, no infringement as to protected expression occurred. The district court's finding that the two illustrations of the reunion scene have such substantial differences as not to warrant a finding of infringement is one we will not disturb.

Affirmed.

beautiful, while the CTW story stresses that what is beautiful to some may not be beautiful to others. More importantly, however, the two works differ in "total feel." Reyher's book presents a picture of family life in the Russian Ukraine and develops the characters of the little girl and her mother. The CTW story is barren of meaningful setting or character development in its attempt to present its theme. The two stories are not similar in mood, details or characterization. Since both present only the same idea, no infringement as to protected expression occurred. The district court's finding that the two illustrations of the reunion scene have such substantial differences as not to warrant a finding of infringement is one we will not disturb.

Affirmed.

APPENDIX A

District Court Opinion Dismissing the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM OPINION

72 Civ. 627 (JMC)

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

—against—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants.

CANNELLA, *D.J.:*

This copyright infringement action was tried to the Court without a jury. After consideration of the facts presented and the law applicable thereto, the Court finds for the defendant and dismisses the complaint.

The plaintiffs herein, Rebecca Reyher and Ruth Gannett, the copyright holders, and respectively the author and illustrator of a children's book entitled, "My Mother Is the Most Beautiful Woman in the World," allege that the defendants, Children's Television Workshop ("CTW") and Tuesday Publications, Inc. ("TPI"), have copied said book and, have, thereby infringed upon plaintiffs' copyright. The alleged infringement occurred when CTW, a non-profit corporation, engaged in, among other activities, the production of the educational children's television program known as "Sesame Street", produced and caused

to be shown on television a segment of the "Sesame Street" program entitled "The Most Beautiful Woman in the World" and when, thereafter, CTW caused articles to be published in both the English and Spanish language versions of the Sesame Street Magazine entitled "The Most Beautiful Woman in the World." Finally, it is alleged that TPI infringed upon plaintiffs' copyright by causing the publication, in an edition of "Tuesday at Home," of a story entitled "The Most Beautiful Woman in the World".

Plaintiffs' book, which was copyrighted in 1945, tells a simple but pointed story. In essence, it relates the tale of a small Russian peasant girl who is lost in the Ukraine. The little girl, having been separated from her mother, makes her way to a village where she tells the inhabitants only that "my mother is the most beautiful woman in the world." Upon hearing this, the villagers proceed to search the surrounding area and to bring all of the local beauties to see the little girl in the hope that one of them will turn out to be her mother. Eventually, the little girl's mother does appear; she is, to the villagers' surprise, a rather homely looking woman. The little girl, however, is not surprised and tells the villagers, "this is my mother, the most beautiful woman in the world." The moral, as the village leader points out, is that "we do not love people because they are beautiful, but they seem beautiful to us because we love them."

It is clear to this Court, having viewed the relevant "Sesame Street" segment and read the three magazine articles involved, that there is a substantial similarity between plaintiffs' copyrighted book and defendants' allegedly infringing works. Although the only phrase

which appears in both works is "Once upon a time, long, long ago," and although there is little, if any, actual paraphrasing of plaintiffs' book in defendants' works, no individual comparing the works at bar could help but conclude that they are substantially similar. While defendants' rendition of the story takes place in a different locale and is told with fewer frills than plaintiffs', both stories present an identical sequence of events.

Nonetheless, before it can be determined whether there has been an infringement of plaintiffs' copyright, the Court must first determine exactly what is protected by that copyright. In the instant case, we have a book which the author candidly admits is based upon a story which was told to her by her Russian mother. It is the belief of plaintiff Reyher (although no direct evidence was adduced to this effect) that the story told to her by her mother is in fact a Russian folk tale. It is clear from plaintiff's testimony that the story line as it appears in her copyrighted book is substantially taken from, if not identical with, the story told to her by her mother. Mrs. Reyher testified that she had "taken a storyline, but I have adapted it and that's a synonym for retold and that's why I raise no objection to retold. It's my treatment. That's what this book is, even though it was my mother's story." (Tr. 120)

Plaintiff did not testify that she had added anything to the story or changed it in any significant way. In fact, the plaintiff indicated that she wrote the book using a Russian dictionary. This clearly suggests a process whereby plaintiff attempted to recall the story as told to her by her mother in Russian, and then to translate that recollection into English. As plaintiff Reyher herself explained the process,

> [i]t not only required a translation, it required two volumes of a Russian dictionary to check certain words and impressions that I had because this was an impression rather than a literal translation. Anything that I used that she [her mother] had told me might have been a translation, but it also was primarily a mood and mine was an interpretation. (Tr. 71-72)

It is thus clear to the Court that plaintiffs' book is a "derivative" work. That is, it has been "substantially copied from a prior work" in the public domain. (1 M. Nimmer on *Copyright* § 39 at 166). The accepted rule as restated in the propesed copyright law (*see Goodis* v. *United Artists Television, Inc.*, 425 F.2d 397, 402-03 (2d Cir. 1970); *Rohauer* v. *Killiam Shows, Inc.*, 379 F.Supp. 723, 728 (S.D.N.Y. 1974)), is that "[t]he copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work. . . ." As one court has put it, if the work allegedly infringed upon is of a derivative nature,

> [t]he plaintiff . . . should be expected to state to us what it is in the story that is copyrightable as new and novel and what part of such material, if any, has been misappropriated by the appellant.
>
> In the case at bar, if it be assumed that there are such similarities between [the two stories] as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an

> infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable. The copyright of the story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another. *Harold Lloyd Corp.* v. *Witwer*, 65 F.2d 1, 22-24 (9th Cir. 1933). *See also Axelbank* v. *Rony*, 277 F.2d 314, 317 (9th Cir. 1960).

Given the derivative nature of plaintiffs' work, the plaintiffs can prevail only if defendants have copied material which was plaintiffs' "original intellectual product" as opposed "to the old public domain elements of which [the author] has made use." *Costello* v. *Loew's Corp.*, 159 F.Supp. 782, 784 (D.D.C. 1958). Here, Reyher's "original intellectual product" surely includes the translation of her mother's story, and it just as surely does *not* include the plot or sequence of events appearing therein. There is no allegation and the facts will not support a finding that the defendants have either copied plaintiffs' work verbatim, or have paraphrased it. The most that could be said is that they have read the plaintiffs' work and have retold the story in their own words. Such a finding will not, given the derivative nature of plaintiffs' work, support a cause of action for copyright infringement. The defendants have not infringed upon any substantial portion of plaintiffs' copyrighted book in which plaintiffs can claim a proprietary interest granted by the copyright laws. In a sense, the defendants have done nothing more than make their own variation of the story Mrs.

Reyher's mother had told her as a child. There being no claim by Mrs. Reyher that her mother's story is copyrighted or that it is entitled to any form of protection, the defendants have the same right to make use of it as does Mrs. Reyher, herself. Thus, defendants' use of a story line which is substantially similar to that appearing in plaintiffs' copyrighted book does not give rise to a cause of action under the copyright laws.

In addition to the claim that the defendants have copied the story appearing in "My Mother is the Most Beautiful Woman in the World," plaintiffs allege that a drawing by Tybor Gergley, depicting the reunion scene at the conclusion of the story, appearing in defendant TPI's publication "Tuesday At Home," infringed upon an illustration by Ruth Gannett appearing in plaintiffs' copyrighted book. The Court, having compared the Gannett drawing with that by Tybor Gergley, finds that the Gergley illustration does not infringe upon Gannett's work.

In determining whether or not the Gergley illustration of the reunion scene is an infringement of Gannett's drawing of the same event, it is helpful to recall the words of Judge Learned Hand in a case involving the infringement of a textile design copyright:

> The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore

> inevitably be *ad hoc*. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement. *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

Although the two illustrations here at issue do evince more than a passing similarity (in both the reunited mother and child are depicted running toward each other with arms similarly outstretched, in both the child's feet are positioned with the left foot raised in a similar fashion, finally, in both the posture of the mother and the relative positioning of the mother and child are similar), it is this Court's finding that the differences between the two (the characters in the more impressionistic Gergley illustration are black Africans dressed in their native garb, while in the Gannett drawing they are Caucasians in Russian peasant outfits, additionally, the Gergley child is a boy while Gannett's is a girl, and the Gergley mother has a package on her back and a stick at her feet while the Gannett mother is shown without accoutrements) are so substantial that the "average layman would indeed detect numerous differences . . . which tend to eliminate any substantial similarity of protected expres-
Jewelry Co., Inc., No. 74-1774 (2d Cir. Dec. 20, 1974)
Jewelry Co., Inc., No. 74-1774 (2d Cir. Dec. 20, 1974)
slip op. at 934 (footnote omitted). Thus, it cannot be said that the Gergley illustration infringes upon Gannett's work.

For the reasons set forth above, it is hereby ordered that the complaint be and hereby is dismissed, with costs, but without attorney's fees, to the defendants.

The foregoing constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Enter Judgment.

JOHN M. CANNELLA,
U.S.D.J.

Dated: New York, N.Y.
January 6, 1975.

APPENDIX A

District Court Opinion Dismissing Defendants' Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 627 JMC

REBECCA REYHER and RUTH GANNETT,

Plaintiffs,

—against—

CHILDREN'S TELEVISION WORKSHOP and TUESDAY PUBLICATIONS, INC.,

Defendants.

CANNELLA, *J.*

MEMORANDUM

Motion by the defendants for summary judgment dismissing the complaint as a matter of law, made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, is denied.

In this copyright infringement action the plaintiffs, author and illustrator, allege that the defendants unlawfully copied their work, "My Mother Is The Most Beautiful Woman In The World" by virtue of the defendants' television production and subsequent magazine publication of a "substantially similar" folk story. On this motion it is not necessary to fully set forth the facts of this case or state the allegations of the parties, indeed, to do so would disserve the interests of judicial economy. All that is necessary to preclude summary judgment is the

existence of a genuine issue as to a material fact or facts. Such facts are here present and the instant motion is denied.

A defendant's motion for summary judgment in a copyright infringement case should be granted only in the rarest instances. *See*, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); S. Rothenberg, Legal Protection of Literature, Art and Music, § 188 at 203 (1960); M. Nimmer, Nimmer on Copyright, § 138 at 599-600 (1965). *Arnstein* v. *Porter*, *supra*, clearly the leading national authority on motions of the instant nature, is controlling here. The following excerpts from Judge Frank's opinion in *Arnstein*, in which Judge Learned Hand joined, interlineated to reflect the facts of the instant case, are dispositive on this motion. 154 F.2d at 468-470.

> The principal question on this appeal is whether the lower court, under Rule 56, properly deprived plaintiff of a trial of his copyright infringement action. The answer depends on whether "there is the slightest doubt as to the facts." [Citations omitted] In applying that standard here, it is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved went so far as to constitute improper appropriation.
>
> As to the first—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying. Of course if there

are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ("dissection") is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue (as noted more in detail below) the test is the response of the ordinary lay hearer; accordingly, on that issue, "dissection" and expert testimony are irrelevant.

In some cases, the similarities between the plaintiff's and defendant's work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation. But, such double-purpose evidence is not required; that is, if copying is otherwise shown, proof of improper appropriation need not consist of similarities which, standing alone, would support an inference of copying.

Each of these two issues—copying and improper appropriation—is an issue of fact.

We turn first to the issue of copying. After listening to the compositions as played in the phonograph recordings submitted by defendant [after reading plaintiffs' book and defendants' tele-

vision script and magazines stories] we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied. The similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.

Summary judgment was [is] then, proper if indubitably defendant did not have access to plaintiff's compositions. Plainly that presents an issue of fact. . . .

. . . [E]even if we were to disregard the improbable aspects of plaintiff's story, [no tale of thugs or stooges is told herein] there remain parts by no means "fantastic." On the record now before us more than a million copies of one of his compositions were sold; copies of others were sold in smaller quantities or distributed to radio stations or band leaders or publishers, or the pieces were publicly performed. [Plaintiff's book was first published 28 years ago. It enjoys a worldwide distribution. It has been reprinted in whole or in part in various anthologies and collections, and has been the subject of educational films and television and radio programs. For a four year period the plaintiff author conducted a weekly radio program on which she was introduced as the author of this book. The book here involved has also received mention in several nationally syndicated newspaper columns.] [1] If, after hearing both

[1] Reyher Affidavit, pp. 4-7.

parties testify, the jury disbelieves defendant's denials, [here, as in Arnstein, defendants' author, Jon Stone, completely denies any access to plaintiffs' book,] [2] it can, from such facts, reasonably infer access. It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself. With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying. Plaintiff must not be deprived of the invaluable privilege of cross-examining the defendant—the "crucial test of credibility"—in the presence of the jury.[3] Plaintiff, or a lawyer on his behalf, on such examination may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief.

To be sure, plaintiff examined defendant on deposition. But the right to use depositions for discovery, or for limited purposes at a trial, of course, does not mean that they are to supplant the right to call and examine the adverse party, if he is available, before the jury. For the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives. As we have said, "a deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand"

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[2] Stone Deposition.

[3] Judge Frank's footnote 8. "He would be so entitled if the trial were before a judge without a jury." 154 F.2d at 470.

for it deprives "of the advantage of having the witness before the jury." It has been said that as "the appearance and manner of the witness" is often "a complete antidote" to what he testifies, "we cannot very well overestimate the importance of having the witness examined and cross-examined in presence of the court and jury." . . .

"The right of a party, therefore, to have a witness subjected to the personal view of the jury, is a valuable right, of which he should not be deprived * * * except by necessity. And that necessity ceases whenever the witness is within the power of the court, and may be produced upon the trial."

With all that in mind, we cannot now say—as we think we must say to sustain a summary judgment—that at the close of a trial the judge could properly direct a verdict. [footnotes omitted]

No more need be said. *See also*, Higgins v. Baker, 309 F. Supp. 635, 637-638 (S.D.N.Y. 1970); Nordstrom v. Radio Corporation of America, 251 F. Supp. 41 (D. Colo., 1965); Harris v. Fawcett Pub., Inc., 176 F. Supp. 390, 394 (S.D.N.Y. 1959); MacDonald v. DuMaurier, 75 F. Supp. 653, 654 (S.D.N.Y. 1946); 6 J. Moore, Moore's Federal Practice ¶ 56.17 [14], at pp. 2515-2519 (1972); Nimmer, *supra*, § 138.

The defendants' brief on the motion contains a series of interesting arguments on the merits of this case; these arguments must properly await another day. After a full plenary trial the court will resolve the merits of

the instant action according to the facts proved and the applicable law, and it is then that the arguments herein advanced by the defendants should be made.

The papers submitted on the instant motion evidence the completion of substantial pre-trial discovery and, therefore, the court directs that the instant action be placed on the court's Ready Calendar fifteen (15) days from the date of this memorandum.

Defendants' motion for summary judgment, pursuant to Fed. R. Civ. P. 56(b), is denied.

So ordered.

/s/ JOHN M. CANNELLA
U. S. D. J.

Dated: New York, N. Y.
January 25, 1974

APPENDIX B

Rule 52(a) Federal Rules of Civil Procedure

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

Article I, § 8, cl. 8

Constitution of the United States: Act 1, § 8, cl. 8;

§ 8 Powers of Congress

Section 8. The Congress shall have Power . . .

17 U.S.C. § 101

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction.—To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringment, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not

be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First: In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second: In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third: In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth: In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

(c) Impounding during action.—To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) Destruction of infringing copies and plates.—To deliver upon oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.